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In the Supreme Court of the United States

OCTOBER TERM, 1996

ESTEBAN ORTIZ, *et al.*,
Petitioners

v.

FIBREBOARD CORPORATION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONERS

1. Hiding behind the fairness of the now-finalized insurance coverage settlement between Fibreboard and its insurers, Respondents offer little rebuttal on the constitutional, statutory, and Rule 23 issues presented by the quite distinct settlement in *this* case. Unlike the Trilateral Agreement that resolved only the disputed insurance coverage, the Global Settlement at issue here extinguishes class members' rights to pursue future, individual, personal injury damages lawsuits against Fibreboard. The question before the Court, as Justice Kennedy remarked at the oral argument in *Amchem Products, Inc. v. Windsor*, No. 96-270 (Feb. 19, 1997), is not whether it would be "far superior" to replace traditional litigation with new forms of dispute resolution, but whether there is a "substantive source of law" that gives the federal courts authority to do so. Tr. Oral Arg. 10. In their ninety pages of opposition briefs, the respondents fail to identify any such font of substantive law.

To divert attention from their inability to answer that fundamental question, the respondents assert that we have distorted this case in order to "leverage" our petition on two cases considered by the Court this Term: *Amchem v. Windsor* and *Adams v. Robertson*, No. 95-1873 (writ dismissed as improvidently granted, March 3, 1997). Br. in Opp. of Continental Cas. Co., *et al.* ("Insurers Opp.") 1. Although respondents now pretend not to see the overlapping issues, they have long been obvious to parties and courts alike.

- The Fifth Circuit majority below noted the conflict with the Third Circuit's decision in *Georgine v. Amchem Products*, but expressly declined to follow that decision (App. 21a-22a), for which the panel was condemned by Judge Smith in dissent. App. 74a.
- The district court below predicated its Rule 23(a) analysis on the district court decision that was reversed by the Third Circuit in *Amchem*. App. 191a.
- As the Court will recall, the settling parties in *Amchem* obtained a writ of certiorari by stressing the "square conflict" on Rule 23 between the Third Circuit there and the Fifth Circuit here. Cert. Pet. in No. 96-270 at 9-11, 16 n. 12. Indeed, one of the class counsel in this case, who is also class counsel in *Amchem*, repeatedly invoked the decision below in his *Amchem* brief as guidance for how the plaintiff class urged the Court to rule in *Amchem*. Br. of Class Counsel Joe Rice *et al.*, in No. 96-270 at 14, 21.

- Class counsel here *concede* that "if this Court were to decide *Amchem* as petitioners hope," the plaintiff class in this case would have to abandon this lawsuit and try to "file[] a different complaint to invoke the District Court's jurisdiction," plead different claims, and seek different declaratory relief. Br. in Opp. of Class Counsel ("Class Counsel Opp.") 21-24.
- The commonality of issues between this case and *Adams v. Robertson* is confirmed by the fact that *all* of the respondents here were so concerned about a possible adverse merits decision by the Court in *Adams* that they filed an amicus brief in support of the Robertson respondents. Respondents expressly stated that their "interest" in the *Adams* case was that "it, like *In re Asbestos Litigation* [this case], involves a challenge to a mandatory class settlement by objectors asserting a constitutional opt-out right." Br. Amici Curiae of Continental Cas. *et al.* in No. 95-1873 at 2.

2. Respondents try to obfuscate the similarities between this case and both *Amchem* and *Adams*. According to respondents, this case presents "a uniquely compelling reason why a unitary class settlement was necessary" (Insurers Opp. 2) because the Global Settlement was supposedly essential to resolve a dispute between Fibreboard and its insurers — a dispute in which class members have an interest as third party beneficiaries under California law. Fibreboard Opp. 17. That claim does not withstand scrutiny.

The Trilateral Agreement of October 12, 1993 disproves respondents' scare-tactic suggestion that the Global Settlement is necessary to protect class members "from losing [their] only chance at recovery." Insurers Opp. 30. It is undisputed that the Trilateral Agreement, by its own terms, is *independent of the Global Settlement*. App. 17a-18a. It provides that, if the Global Settlement fails, the insurers will pay Fibreboard $2 billion, which Fibreboard can then use — in addition to its own assets — to pay future (unfiled) and present unresolved asbestos-related claims. *Id.* Furthermore, the Trilateral Agreement provides another $1.5 billion to pay Fibreboard's *past*, unpaid settlement obligations. Fibreboard's counsel testified that the Trilateral Agreement was worth $3.35 billion. Tr. 604.[1]

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[1] To be sure, the *Continental Cas. Co. v. Rudd* proceeding, App. 58a-63a,

Unlike the Global Settlement, the Trilateral Agreement does not limit asbestos victims' tort remedies, nor does it bind them to an alternative dispute resolution (ADR) process for the adjudication of their state-law personal injury claims. The very existence of the Trilateral Agreement reveals that the Global Settlement has two analytical components: the first resolves the insurance dispute (just as the Trilateral Agreement did), and the second trades class members' potential lawsuits against Fibreboard for ADR claims against a Trust whose liabilities are limited to insurance proceeds plus $10 million of Fibreboard's $250 million net worth. App. 84a. Our attack focuses on the second of these components.

Tellingly, respondents' sole basis for touting the Global Settlement as superior to the Trilateral Agreement is the very same inadmissible value of "increased efficiency over individual litigations in the tort system" (Insurers Opp. 1) that, they protest, taints only *Amchem* and *Adams*, and not their arguments in this case. Thus, respondents criticize the Trilateral Agreement for "leav[ing] class members' claims to be resolved in litigation against Fibreboard" and for failing to impose the euphemistically described "equitable distribution and asset-conservation procedures established by the Global Settlement." *Id.* at 9. Any risk that class members' future lawsuits against Fibreboard might exhaust the $2 billion provided under the Trilateral Agreement has nothing at all to do with the insurance coverage dispute, and everything to do with the inherent costs of litigation, due process, the right to jury trial, and the limits of Art. III. As Justice Ginsburg remarked (Tr. Oral Arg. 9) during the *Amchem* argument:

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which approved the Trilateral Agreement, granted the insurers declaratory and injunctive relief establishing that the Trilateral Agreement was fair with respect to the class members even though it cut off their right to sue the insurers directly. But this relief did not affect the rights of asbestos victims *to sue Fibreboard*. Yet the Global Settlement extinguishes future, not-yet-justiciable tort claims against Fibreboard — claims for injuries that do not exist but might arise in the future. By contrast, the class members in *Rudd* had a common interest in resolving the propriety of an *existing* settlement between Fibreboard and its insurers. That certainly does *not* give class members a common interest in "unitary resolution" of their potential personal injury claims against Fibreboard. *See also* Appendix to Fibreboard Opp. 7a, 10a-16a.

> [I]t was my understanding that there is a right for one to litigate one's own claim, and that's the basic rule, and if that's going to be displaced, there has to be a good reason for it, and that good reason, I assume, is not for the courts to make up in the guise of procedure.

3. Respondents claim that, as a factual matter, there would not have been any resolution of the insurance coverage dispute absent the Global Settlement. That claim is both irrelevant and inaccurate. The peculiarities of the bargaining process, as recounted by respondents' self-serving testimony, cannot give a federal court authority under Rule 23, the Rules Enabling Act, the Rules of Decision Act, due process, or Art. III to alter the substantive rights of class members or to exercise jurisdiction in a feigned case.

Further, respondents' assertion is belied by the very terms of the Trilateral Agreement, which provide that it will be in force precisely if and when the Global Agreement has been invalidated and when Fibreboard thus is not insulated from asbestos claims in the tort system. App. 17a-18a. Despite respondents' intimations to the contrary, the district court *never* found that the coverage dispute would not have settled but for the Global Agreement. Instead, the court found (Finding of Fact 140, App. 279a-80a) that Continental and Fibreboard were unable to reach a bilateral settlement of the coverage case in 1993 *only* because (i) CNA's offer was not high enough, and (ii) CNA wanted Pacific to contribute. The Global Settlement was not necessary to overcome either stumbling block.

Respondents can cite only conclusory and ambiguous rhetoric (App. 198a) in the district court's memorandum opinion (*not* its Findings of Fact), which cannot be equated with a finding that the insurance coverage dispute could not have been settled without asbestos victims giving up their claims against Fibreboard. Indeed, at the fairness hearing Fibreboard's counsel *denied* that such extinguishing of claims was necessary. Appendix hereto 1a. He testified that, just a month prior to reaching the Global Settlement, Fibreboard had been willing to accept a coverage settlement that would have paid it *$150 million less* than it ultimately received in the Trilateral Agreement (whose total value was about $3.35 billion). *Id.*

4. Respondents also insist that this case is different from *Amchem* and *Adams* because the Global Settlement does "*not*

liquidate the recoveries of individual class members." Insurers Opp. 2. Yet the Global Settlement fixes the ADR procedure through which the claims will be liquidated, just as the *Amchem* settlement does. Cert. Pet. 7; App. 559a-597a. That procedure is *not* the procedure established under applicable state law. The mere fact that the Global Settlement contains less detail than the *Amchem* settlement and does not establish a comprehensive compensation schedule does not affect the legal issues. App. 74a. Indeed, once respondents' mischaracterizations of this case are corrected, it is plain that this case presents the same constitutional, statutory, and Rule 23 issues as *Amchem* and *Adams*, plus an important question regarding Rule 23(b)(1)(B).

5. It is beyond dispute that the court below openly and avowedly sustained certification of the class under Rule 23(a) entirely by reference to the settlement. App. 22a, 23a, 24a n.8. The "vice" is the same one identified by Justice Souter in *Amchem*: the "settlement is being used as a sufficient basis in and of itself to answer ... these various preceding conditions for class certification." Tr. Oral Arg. 17. *See also id.* at 13, 14, 16, 18 (questions of Souter, J., and Ginsburg, J.). Indeed, the vice is, if anything, more iniquitous and menacing in this case, because the legal issues that allegedly furnish the requisite commonality and typicality under Rule 23(a) for this class certification are created *not* by the claims alleged in this class action, *but by another lawsuit.*

Respondents themselves are unanimous that the "common" issue arose not from the asbestos personal injury claims in the class complaint here (App. 536a-39a), whose certification under Rule 23 was at stake, but instead involved the "avoidance of a loss on the coverage appeal" being litigated between Fibreboard and its insurers in a different lawsuit. Fibreboard Opp. 22; Class Counsel Opp. 21; Insurers Opp. 16. Indeed, class counsel concede the complete disconnect between the personal injury claims pleaded in the class action complaint and the "common interest" in Fibreboard's insurance coverage litigation that supposedly makes the asbestos claimant class cohesive and certifiable under Rule 23. Class Counsel Opp. 21-22.

A commonly held interest as contingent third-party beneficiaries in the settlement of an insurance coverage dispute being litigated in

a California state court cannot possibly fulfill the Rule 23(a) prerequisites for certification of a separate personal injury class action pending in a federal court in Texas. If the settlement of a different lawsuit to which the plaintiff class is not party is indeed sufficient to meet the requirements of Rule 23, then that rule would appear to have no limits left at all.

6. The petition demonstrated that the questions posed in *Adams v. Robertson*, No. 95-1873 (Mar. 3, 1997) (*per curiam*), are also presented here. This Court has displayed "continuing interest" (slip op. *id.* at 8 n.6) in the question whether due process requires opt-out rights for the kinds of *in personam* money damages claims that were the *only* legal claims pled in the class complaint here. App. 536a-540a. The petition also demonstrated that the "limited fund" contrived by respondents cannot justify certification under Rule 23(b)(1)(B), particularly as informed by the Rules Enabling Act, the Rules of Decision Act, and principles of federalism.[2]

Respondents' answer to both arguments hinges on their attempt — which flies in the face of the complaint — to repackage this case as a wholly equitable proceeding to secure the insurance proceeds for class members. That attempt fails because such a repackaging, even if permitted, *would not allow resolution of class members' individual personal injury claims against Fibreboard. See* pages 2-4, *supra*. Moreover, the cases cited by respondents relate to conflicting claims over a *pre-existing res* that antedated the litigation — such as a bond, a trust fund, a ship, or a fixed sum — not to claims regarding a fund that is itself *created* by a settlement. Fibreboard *concedes* that this was not a "situation with fixed, known assets to be parceled out." Fibreboard Opp. 21. As Justice Souter observed in the *Amchem* argument, there will *always* be a "limited fund" in the settlement context in the sense that there is an upper limit to what the defendant is willing to pay. Tr. Oral Arg. 14. If that were sufficient to trigger Rule 23(b)(1)(B) — as respondents imply with their simplistic argument that Rule 23(b)(1)(B) applies

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[2] Even the Supreme Court of Alabama, which approved the *Adams* class, has rejected application of Rule 23(b)(1)(B) to tort actions based on speculation regarding exhaustion of the defendant's assets. *Ex parte Holland*, 1997 WL 139479, *6-9 (Ala. Mar. 28, 1997).

whenever there is a theoretical "risk" that satisfaction of one class member's claim will compete with another's (Insurers Opp. 11-12) — then *every* settlement of claims for money damages would be eligible for treatment not only under Rule 23(b)(3) but also under Rule 23(b)(1)(B).

The underlying substantive rights of *in rem* claimants are *already* limited by any competing claims against the same *res*. Therefore, a mandatory class action encompassing all competing claims does nothing to alter the substantive rights of class members.[3] By contrast, outside of bankruptcy, the substantive law does not allow courts to limit individual plaintiffs' *in personam* recoveries in order to ensure that money will be left for later-suing persons.[4]

7. Respondents opine that the Art. III questions raised in the petition here, similar to those at issue in *Amchem*, are "contrived" and of no possible interest to this Court. Insurers Opp. 18 & n.*. Yet in *Amchem* Justice Ginsburg expressed doubts about the

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[3] In *Christopher v. Brusselback*, 302 U.S. 500 (1938), this Court noted that the jurisdiction of federal courts in a class suit is limited "to render[ing] a decree binding upon absent defendants *affecting their interest in property witnin the jurisdiction of the court*." *Id.* at 505 (emphasis added). The cited reference to Justice Story's COMMENTARIES (Insurers Opp. 21) pertains not to traditional *in personam* claims for money damages, but to proceedings where "a few creditors may maintain a suit on behalf of themselves and all other creditors of a deceased debtor" to distribute the estate. COMMENTARIES ON EQUITY PLEADINGS, § 99 (9th ed. 1879). Professor Chafee, upon whom respondents also rely (Insurers Opp. 21, 23), acknowledged that class actions were historically limited to the *in rem* context, where "all the members are connected similarly with land or money within the jurisdiction." *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1308 (1932). "On the other hand, if the enjoined persons have special claims or liabilities, their rights are personal and cannot be concluded in their absence." *Id.*

[4] The personal jurisdiction analysis of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), also applies here, for this is a class action "concerning claims wholly or predominantly for money judgments." *Id.* at 812 n.3. Respondents' attempt to limit *Shutts* to state courts (Insurers Opp. 26-27) is unavailing, as several lower courts have held. *See, e.g., Carlough v. Amchem Products*, 10 F.3d 189, 200 (3d Cir. 1993)("traditional minimum contacts requirement applies" in a federal diversity class action); *Waldron v. Raymark Industries*, 124 F.R.D. 235, 238 (N.D.Ga. 1989)(language in *Shutts* is "equally applicable to federal courts").

propriety of a federal district court "creating this vast exposure-only litigation that never existed," Tr. Oral Arg. 20; Justice Scalia suggested that there is no "case or controversy" when parties show up to ask a court to adjudicate a settlement they've already agreed upon, *id.* at 25-26; and Justice Kennedy indicated that such a cooperative effort to have a federal court enact an alternative dispute resolution scheme would appear to "exceed[] the bounds of case or controversy." *Id.* at 24-25.

Respondents insist that their cooperative class action is justiciable because it depends on approval of a court under Rule 23(e) and on the issuance of an injunction to bind the absent class — but that same analysis in *Amchem* was criticized as apparently "circular" by Justice Souter. Tr. Oral Arg. 26. The respondents, like the settling parties in *Amchem*, rely on *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), and its progeny. Insurers Opp. 19 & n.*; Fibreboard Opp. 26. But as Justice Kennedy pointed out, in those consent-decree cases there was an actual contemplated lawsuit and "an imminent litigable dispute," Tr. Oral Arg. 32, that would have transpired if the consent decree were not issued, whereas here is it *undisputed that the class never had any intention of litigating the class complaint, which was filed solely to provide the district court with a jurisdictional hook.* App. 52a.[5] As Justice Ginsburg pointed out, such theoretical future plaintiffs "do not have a claim for relief because they haven't been injured yet." Tr. Oral Arg. 57-58.[6]

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[5] In the consent decree cases there was every reason to think that, if the defendants had not consented to the decrees banning future misconduct, and if those decrees had not been approved by the courts, the government and the private parties who opposed it would have gone back to litigating against each other as they had been preparing to do. After all, the consent decree cases involved continuing conflict between the parties over *future* misconduct by the defendants that had to be addressed by an injunction. *See Swift*, 276 U.S. at 326 (injunction concerned "not with past violations, but with *threatened future ones*") (emphasis added); *SEC v. Randolph*, 736 F.2d 525, 527-28 (9th Cir. 1984) (case justiciable because of "prospective injunctive relief" against "future violations of securities laws").

[6] The Chief Justice and Justice Scalia suggested that the consent decree cases might be distinguishable on the further ground that they were all government agency cases that preserved the rights of individuals injured by the defendant's conduct. Tr. Oral Arg. 27. *See, e.g., Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1003 (3d Cir. 1976).

Remarkably, respondents concede that the settled "claims" have nothing to do with what was actually pleaded in the complaint. They say that, if this Court were to insist, they would be happy to "file a different complaint to invoke the District Court's jurisdiction to consider the settlement" — that is, a complaint actually "capable of being litigated to judgment in the absence of this settlement." Class Counsel Opp. 21. Evidently it's all the same to the respondents, since the pleadings and this lawsuit are a charade in any event.

But class counsel suggest that it would be simpler for this Court to cure their failure to allege genuine, justiciable claims by "deem[ing] the pleadings amended to conform to the evidence adduced at the fairness hearings," pursuant to Fed.R.Civ.P. 15(b). *Id.* at 23-24. Such sleight-of-hand won't help respondents. First, Rule 15(b) merely allows deemed amendments of complaints which are themselves sufficient to support federal jurisdiction; a failure of jurisdiction is not some minor pleading discrepancy that can be retroactively papered-over on appeal. Second, the two new claims urged by class counsel to support jurisdiction to approve the Global Settlement — (i) that Fibreboard was in fact insured by the contested policies and (ii) that the settlement between Fibreboard and its insurers was not binding on the class — were *not* in fact litigated at the fairness hearing, so there is nothing to which the defective complaint can be "conformed." Indeed, the very purpose of that proceeding (and of the Global Settlement itself) was to *avoid* a judicial decision on the coverage issues. Third, even if the Court were to pretend that the hypothetical claims involving the class stake *in favor* of insurance coverage for Fibreboard had been alleged and proven, those claims would not allow approval of the Global Settlement, because it extinguishes entirely *different* claims — the class members' individual personal injury claims *against Fibreboard*.

8. The Fifth Circuit majority grudgingly accepted the general proposition that the Bankruptcy Code governs the distribution of the assets of a company beset by more creditors than it can satisfy. App. 42a. But convinced that it could do a better job in this case, *id.* at 42a-43a, and citing 11 U.S.C. § 305(a)(1), the court below concluded that Congress intended that "the terms and principles of the Bankruptcy Code would be circumvented by debtors and creditors who found superior methods of asset distribution." App.

44a. Respondents likewise argue that this section of the Code "expressly authorizes the district courts to sanction a resolution outside of bankruptcy where the relevant interests would be 'better served.'" Insurers Opp. 29.

But § 305(a)(1) (Appendix hereto 2a) merely allows a federal court to dismiss or suspend a bankruptcy proceeding "if an arrangement is being worked out by creditors and the debtor out of court." H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977). It is an *abstention* provision designed to promote voluntary private ordering by economic actors. It is *not* a grant of *authority* to the federal judiciary to ignore Art. III and the Rules Enabling Act, and to circumvent the Bankruptcy Code, by using Rule 23 to legislate its own solutions that prospectively alter the substantive, state-law rights of unknowing, unidentified, unconsenting tort victims.[7]

The decision below thus raises the very problem that appeared to concern this Court in *Amchem*. As Justice Kennedy put it:

> If I were the district judge, I'd say, this is marvelously superior, but that is a substantive determination that you are going to displace existing law with a new, different, substantive regime, and I don't think the rules allow you to do that.

Tr. Oral Arg. 10-11. Making and imposing such substantive choices "is not the intent of [Rule 23]" and "exceeds the authority of the courts under the rule. ... [it] is the basis for legislation." Tr. Oral Arg. 22 (Kennedy, J.). *See also id.* at 23-24, 56-57. The Fifth Circuit's almost cavalier arrogation of legislative authority demands the plenary attention of this Court.

CONCLUSION

The petition should be granted or, at the very least, held for disposition pending the resolution of *Amchem v. Windsor*, No. 96-270.

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[7] Indeed, in the Bankruptcy Reform Act of 1994, Congress enacted special provisions for insolvent defendants subject to present and future asbestos-related liabilities. *See* 11 U.S.C. §§ 524(g) & (h).

Respectfully submitted.

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APPENDIX

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

TESTIMONY OF STEPHEN M. SNYDER, Esq., Counsel for Fibreboard Corporation

[Commencing at page 592 of the Joint Appendix in the Fifth Circuit:]

Q: [W]ould you agree with me, then, that it would have been impossible under that agreement for Continental to have settled their coverage in a way that would not have let — would not have extinguished all of the asbestos liabilities of Fibreboard?

A: No, that's not true at all.

Q: What would have been the circumstances where that could have happened?

A: I believe we had negotiations with them in 1993 whereby if they had written a big enough check we would have done just that.

Q: Okay.

A: Just didn't work, that's all.

[Commencing at page 605 of the Joint Appendix in the Fifth Circuit:]

Q: So you would have been willing to enter into a bilateral settlement with Continental in July [1993] for a little over $3 billion, a little over a hundred or two hundred million over $3 billion?

A: 3.2 or something like that.

APPENDIX

11 U.S.C. § 305(a)(1)

§ 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title or may suspend all proceedings in a case under this title at any time if —

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension.